Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: April 7, 2016; Ruling No. 2016-4310; Agency: College of William & Mary; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the College of William and Mary
Ruling Number 2016-4310
April 7, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his January 26, 2016 grievance with the College of William and Mary (the "College") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the College as a utility plant operator. In October 2015, the grievant raised concerns regarding his pay with current management. After review, the College determined that the grievant's salary should be increased 10 percent for the current fiscal year and a remaining 5.6 percent in the next fiscal year.[1] On January 25, 2016, the grievant initiated a grievance apparently challenging the College's failure to pay him the entire adjustment retroactive to October 2015**.** He appears to argue that the College erred in not seeking approval from DHRM to grant the entire 15.6 percent adjustment in this fiscal year. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"[3] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action

[1] Although various amounts have been cited for the adjustment proposed for next fiscal year, the third-step respondent confirmed to the grievant that the subsequent adjustment would increase his salary an additional 5.6 percent effective the first salary period of July 2016.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[4] *See Grievance Procedure Manual* § 4.1(b).

is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

In this case, the grievant effectively argues that management has misapplied and/or unfairly applied policy in failing to award him the 15.6 percent adjustment retroactive to October 2015. Fairly read, he also argues that the College has misapplied policy by not requesting DHRM approval for an exceptional in-band increase on his behalf. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

In-band adjustments are governed by DHRM Policy 3.05, *Compensation*. This policy allows agencies to grant an employee an in-band adjustment, which is a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues."[7] Under DHRM policy, an upward increase from zero to ten percent is available "to align an employee's salary more closely with those of other employees' within the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, competencies, and/or knowledge and skills."[8] An agency may request DHRM approval of "exceptional in-band increases that exceed 10% during a fiscal year when it is demonstrated that the circumstances, based on pay factor analysis, significantly exceed the criteria normally applied…."[9] The decision to seek such an exception is within an agency's sole discretion.[10]

While DHRM Policy 3.05, *Compensation*, reflects the intent that similarly situated employees should be comparably compensated, it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of thirteen enumerated pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long term impact; and (13) current salary. Because agencies are afforded great

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] DHRM Policy 3.05, *Compensation*.
[8] *Id.*
[9] *Id.*
[10] *See id.*; *see also* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices.* Like all pay practices, in-band adjustments are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.

flexibility in making pay decisions, EDR has repeatedly held that qualification is warranted only where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[11]

In this case, the College apparently determined that while an in-band adjustment in the grievant's pay was appropriate, there were no exceptional circumstances warranting a request for permission from DHRM to award more than a 10 percent increase during the fiscal year. Under policy, such a decision was within the College's discretion. Although the grievant may disagree with the College's assessment, as well as its decision not to award the adjustment retroactive to October 2015,[12] we cannot say that the College's actions were improper or otherwise arbitrary or capricious. Likewise, EDR has reviewed nothing to indicate that the College's actions were inconsistent with its treatment of other similarly situated employees with comparable relevant work experience. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[13]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[11] See Grievance Procedure Manual § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling No. 2008-1879.
[12] The 10 percent adjustment was made retroactive to November 10, 2015. As the grievance was not initiated until January 26, 2016, any relief available under the grievance procedure could only be made retroactive until December 28, 2015, 30 calendar days prior to the initiation of the grievance. *See Rules for Conducting Grievance Hearings* § VI(C)(1).
[13] Va. Code § 2.2-1202.1(5).